

OGC-565

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OGC Has Reviewed

18 November 1949

MEMORANDUM FOR: OPC/SADO

SUBJECT: Retired Officers

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1. Our comments on your original inquiry concerning [REDACTED] raised the question of returning him to active duty only because no other solution seemed feasible. We appear to be at fault in not making ourselves quite clear in this respect.

2. The dual compensation laws are not restricted solely to the point of holding two offices, although that is a very important element set forth in 5 U.S.C. 62. The other pertinent sections of Title 5 of the United States Code are Sections 58, 59, 59a, 69, 70 and 72. Section 58 prohibits payments to any person receiving more than one salary when the combined amount of said salaries exceeds \$2,000 per year. Section 59 excepts retired officers from this prohibition, but in 1932 Section 59a was passed which said that no one holding a civilian office or position shall, at the same time, draw retired pay for services as a commissioned officer where the total rate from both sources is more than \$3,000 per year. If the retired pay equals or exceeds \$3,000 per year, the person shall be entitled to the pay of the civilian office or retired pay, whichever he may elect. Section 62 is the prohibition on holding two offices. Section 69 prohibits payment of any extra allowance or compensation for extra services required of any officer. Section 70 prohibits the officer whose salary, pay or emoluments are fixed by law or regulations to receive any extra pay, allowance or compensation in any form whatever. Section 72 provides that it shall not be lawful to pay to any person in the service of the United States under any general or lump sum appropriation, any sum additional to the regular compensation.

3. There are many opinions by courts, the Attorney General and the Comptroller General interpreting the above-mentioned sections. The Comptroller General has

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been rigid in his interpretation and, particularly, in his opinion that it has been the intent of Congress to prohibit employment of retired officers in the Executive Branch of the Government, except under certain specified circumstances which do not apply to the case under consideration. The Attorney General and the Court of Claims have been somewhat more liberal in individual cases, but the Comptroller General would not consider himself bound by either of these authorities as he is the representative of the Legislative Branch of the Government. The intent of Congress is clarified somewhat by the fact that a Bill was proposed late this last term to eliminate the restrictions on employment of retired officers by the Executive Branch and limiting combined compensation to \$5,000. The present indication is that this Bill has little chance of passing. A further indication arises from the fact that when the Veterans Administration stated that it would find it difficult to perform its functions unless it could employ retired officers, they were given a limited exemption to the ordinary restrictions for a period not to exceed five years.

4. The most recent Comptroller's decision on this point concerned a retired Admiral with whom the ABC contracted for consultant services on a daily fee basis. The Comptroller denied payments under the contract on the grounds that although he was termed a consultant, he was paid on a time basis and was subject to the restrictions of Section 212 of the Economy Act, which is cited above as Section 59a of the U. S. Code. We can perceive no distinction between your proposal for [redacted] and this case involving [redacted] even though in this case the rate of pay is determined by the difference between his retired pay and his active duty pay.

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5. Accordingly, we are of the opinion that the proposal for [redacted] is not legally permissible under the law as it now stands. The prohibition runs both to the Agency and to the individual so that any payments made, which later were ruled illegal, could be collected from the certifying officer or the retired officer or both. In addition, since the individual is presumed to know the law, it is felt that he would not wish, as a retired officer, to be in a position of wilfully violating law by accepting the payments in question. Even if we, as an Agency, therefore,

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felt that we might be able to support such payments,
we would be forced to advise [REDACTED] to consult
his own attorneys prior to acceptance of any such pay-
ments for his own protection.

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LRH/ml1

cc: Chrono
✓ Subject
Legal Decisions

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